

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MARTIN STRAZNICKY, M.D.,

Plaintiff,

v.

DESERT SPRINGS HOSPITAL, *et al.*,

Defendants.

Case No. 2:09-cv-00731-LDG (RJJ)

ORDER

This matter is before the court on the defendants' motions to dismiss (## 18, 27) the complaint filed by Martin Straznicky, M.D. pursuant to Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim. Straznicky opposes both motions (## 29, 37). The court will grant the motions.

Motions to Dismiss

The defendants' motions to dismiss, brought pursuant to Rule 12(b)(6), challenge whether the plaintiff's complaint states "a claim upon which relief can be granted." In ruling upon these motions, the court is governed by the relaxed requirement of Rule 8(a)(2) that the complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." As summarized by the Supreme Court, a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.*

1 *v. Twombly*, 127 S.Ct. 1955, 1974 (U.S. 2007). Nevertheless, while a complaint “does not
2 need detailed factual allegations, a plaintiff’s obligations to provide the ‘grounds’ of his
3 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation
4 of the elements of a cause of action will not do.” *Id.*, (citations omitted). In deciding
5 whether the factual allegations state a claim, the court accepts those allegations as true, as
6 “Rule 12(b)(6) does not countenance . . . dismissals based on a judge’s disbelief of a
7 complaint’s factual allegations.” *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Further,
8 the court “construe[s] the pleadings in the light most favorable to the nonmoving party.”
9 *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F3.d 895, 900 (9th Cir. 2007).

10 Procedural Background

11 Straznicky initiated this action by filing his complaint on April 23, 2009. The
12 following day, he filed a motion for a temporary restraining order and for a preliminary
13 injunction. In so doing, Straznicky attached several exhibits to his motion, including copies
14 of documents referenced in his complaint. The court heard arguments on the TRO motion,
15 denied the motion, and set a hearing on the motion for a preliminary injunction. At the
16 outset of the preliminary injunction hearing, Straznicky requested that the hearing be
17 continued for several weeks.

18 Straznicky moved to consolidate this matter with two other cases involving doctors
19 and hospitals that are being prosecuted by his counsel.

20 At a status conference prior to the continued preliminary injunction hearing, the court
21 denied the motion to consolidate, and vacated the preliminary injunction hearing.

22 Pending before the court are the defendants’ motions to dismiss, which Straznicky
23 opposes. This court heard arguments from the parties.

24 Factual Background

25 As this matter is before the court on motions to dismiss for failure to state a claim,
26 this factual background relies solely upon the allegations of the complaint, and upon those

1 documents referenced in the complaint which Straznicky submitted to the court with his
2 motion for a temporary restraining order.

3 On February 2, 2009, a neurosurgeon was performing a spinal procedure on a
4 patient under Straznicky's care. X-rays would be taken during this procedure, but
5 Straznicky did not have a lead shield in the operating room. Straznicky instructed a
6 radiology technologist to go into an adjacent operating room to obtain the lead shield.

7 In the adjacent operating room, Dr. Hugh Bassewitz (named by Straznicky as a
8 defendant) was performing a surgery that was already in process. Dr. Bassewitz informed
9 the technologist that he could not take the shield. When the technologist informed
10 Straznicky of this, Straznicky then entered the adjacent operating room in which Dr.
11 Bassewitz was performing surgery, and asked Dr. Bassewitz about using the lead shield.
12 Dr. Bassewitz denied Straznicky's request. Nevertheless, Straznicky took the lead shield.

13 On February 6, 2009, Straznicky received a letter from Drs. Michael L. Gross and
14 Zafir Y. Diamant. The contents of that letter, which are before the court,¹ notified
15 Straznicky that the Medical Executive Committee (MEC) had summarily suspended him as
16 of February 6, 2009. The decision to summarily suspend Straznicky was based upon a
17 report received by the Medical Staff leadership indicating that Straznicky had "exhibited
18 conduct that 'requires that immediate action be taken to reduce a substantial likelihood of
19 imminent impairment of the health or safety of any patient, prospective patient, employee
20 or other person present in the hospital. . . .'"

21 The letter then recites a portion of the report received by the Medical Staff
22 leadership:

23 A Radiology tech came into Room 8 while surgery was in process and
24 requested to borrow the x-ray shield for Dr. Straznicky. He was advised that
he could not use the shield as the equipment was needed for the ongoing

25 ¹ Straznicky references the letter in his complaint, and submitted the letter as
26 an attachment to his TRO motion.

1 case. He left and approximately two minutes later, Dr. Straznicky came into
 2 the room and questioned the surgical team and Dr. Bassewitz about the x-ray
 3 shield. He began to get confrontational about the shield and when he
 4 became visibly upset, Dr. Bassewitz kindly but sternly asked Dr. Straznicky to
 leave his room. Dr. Straznicky said, "Fine" and left the room but took the x-
 ray shield with him. Dr. Bassewitz was visibly disturbed by the confrontation
 and requested to speak with administrative personnel, which was done.

5
 6 The letter describes this as "disruptive conduct that caused a distraction for the
 7 surgeon, and, thereby caused a probability of danger to the patient."

8 The letter further notified Straznicky that he could request an "interview" with the
 9 Medical Executive Committee "for the purpose of determining whether or not the summary
 10 suspension should be terminated pending an evidentiary hearing," and that "[s]uch
 11 evidentiary hearing must be simultaneously requested. . . ."

12 On February 13, Straznicky requested an interview with the Medical Executive
 13 Committee, but did not simultaneously request an evidentiary hearing. On February 16,
 14 Straznicky amended his request for an interview and requested an evidentiary hearing.

15 On February 18, the Medical Executive Committee interviewed Straznicky.

16 On February 19, Straznicky received a letter from Dr. Gross. In the letter,² Dr. Gross
 17 informed Straznicky:

18 Based upon your appearance and a review of the issues surrounding your
 19 summary suspension, the MEC has recommended your summary suspension
 be terminated provided you comply with the following:

- 20 • You must report as soon as possible and no later thirty (30) [sic] days
 21 from the date of this letter to the Nevada Physicians Health Program
 (NPHP) for evaluation; and you must follow the NPHP's
 22 recommendation, if any, for behavioral modification. Failure to timely
 report to the NPHP and follow its recommendations, including maintain
 advocacy by the NPHP, will subject you to further disciplinary action.
 The NPHP's Director is Dr. Peter Mansky. . . .
- 23 • Apologize to the health care team involved in the incident that initiated
 24 the summary suspension. In addition, you agree to refrain from verbal,
 written or insinuated retaliation or retribution toward any of the

25
 26 ² Straznicky summarizes portions of the letter in his complaint, and submitted
 the letter to the court as an attachment to his TRO motion.

1 individuals involved in the incident leading to your summary
2 suspension, or any of the hospital's nursing or health care staff.

- 3 • You enter into a Privilege Retention Agreement acknowledging, among
4 other things, Desert Springs' zero tolerance policy for disruptive
5 behavior, which continues for the duration of your Medical Staff
6 membership at Desert Springs.

7 A copy of the Privilege Retention Agreement is enclosed for your review and
8 execution. Please return the executed Agreement to the Medical Staff
9 Department within ten days of receipt of letter [sic] and no later than March 3,
10 2009. Failure to comply with the recommendations of the MEC may result in
11 disciplinary action, including the continuation of suspension.

12 Straznicky sought, but did not receive, an alternative resolution. He was informed
13 that if he did not sign the Privilege Retention Agreement, his continued suspension would
14 trigger a requirement to report the suspension to the National Practitioner Data Bank (Data
15 Bank).

16 Straznicky and Dr. Gross signed the Privilege Retention Agreement on March 3,
17 2009. Dr. Gross informed Straznicky that his privileges were reinstated.

18 On March 3, Straznicky also asked Desert Springs' CEO, Sam Kaufman, and
19 another individual whether he was under investigation, to which they replied there were "no
20 investigations of any kind regarding or involving him."

21 On March 26, Straznicky asked the Director of Medical Staff about the status of his
22 privileges. She replied that they were in good standing and without restriction. Straznicky
23 then resigned.

24 On April 10, 2009, Desert Springs filed an adverse action report regarding Plaintiff in
25 the Data Bank. The report states that the Adverse Action Classification Code as "Voluntary
26 Surrender of Clinical Privilege(s), while under, or to avoid, investigation relating to

1 professional competence or conduct (1635).”³ The report goes on to describe the
2 underlying events:

3 Practitioner was summarily suspended on February 6, 2009, as a
4 result of quality of care issues related to practitioner’s disruptive and
5 unprofessional conduct. Summary suspension was deemed necessary to
6 reduce the substantial likelihood of imminent impairment to the health or
7 safety of the hospital’s patients. The summary suspension was issued by the
8 Chief of Staff and the Chairman of the Department of Anesthesiology, and on
9 behalf of the Medical Executive Committee, in accordance with the
10 Credentialing Manual of the Medical Staff, Section 9.7.1. The practitioner
11 requested and was granted an interview with the Medical Executive
12 Committee. The interview was held on February 18, 2009. Following the
13 interview, the Medical Executive Committee elected to lift the suspension and
14 cease its investigation related to practitioner, provided that the practitioner
enter into and comply with a Privilege Retention Agreement. On March 3,
2009, the practitioner entered into a Privilege Retention Agreement with the
Medical Executive Committee, pursuant to which the practitioner’s full clinical
privileges were restored, and the practitioner agreed to engage in certain
corrective actions. On March 26, 2009, prior to completing the corrective
actions required under the Privilege Retention Agreement, the practitioner
notified the hospital that he was resigning from the medical staff. As the
practitioner entered into the Privilege Retention Agreement to avoid
investigation and then resigned prior to completing the terms of the Privilege
Retention Agreement, his resignation was a surrender of his clinical privileges
to avoid investigation.

15 Based upon this alleged conduct, Straznicky alleges a claim for declaratory and
16 injunctive relief, three anti-trust claims, a 42 U.S.C. §1983 claim, and eight state law claims.

17
18 Dr. Bassewitz’ Motion to Dismiss

19 With little difficulty, the court concludes that the complaint must be dismissed as to
20 Dr. Bassewitz. In his complaint, Straznicky makes only two allegations that specifically
21 concern Dr. Bassewitz’s conduct. First, that Dr. Bassewitz informed the technologist (sent
22 by Straznicky) that he could not take the lead shield. Second, when Straznicky personally
23 inquired about the lead shield, Dr. Bassewitz “was belligerent and refused to assist”

24
25 ³ Again, the contents of the Data Bank report are properly before the court as
26 Straznicky referenced the Data Bank report in his complaint, and he attached a copy of the
report to his TRO motion.

1 Straznicky. While Straznicky's complaint also contains numerous allegations directed
2 generally at conduct by "Defendants," the context makes clear that much of the alleged
3 conduct cannot be attributed to Dr. Bassewitz. For example, Straznicky alleges that the
4 "Defendants" reported an action taken against him to the Data Bank. Dr. Bassewitz,
5 however, is not an entity who can file such a report. Further, the report itself establishes
6 that it was filed by Desert Springs Hospital. Similarly, Straznicky seeks to hold all
7 defendants, including Dr. Bassewitz, liable for a breach of an implied covenant of good
8 faith and fair dealing. Straznicky, however, does not allege that he entered into any
9 agreement with Dr. Bassewitz or with any defendant other than Desert Springs Hospital.
10 Further, in opposing the motion to dismiss, both in the papers he submitted to the court and
11 in his arguments during the hearing, Straznicky failed to offer any argument or theory
12 suggesting how the allegations of the complaint are sufficient to state a claim for breach of
13 the implied covenant as to Dr. Bassewitz.

14 Indeed, Straznicky's opposition is the most telling signal of the complaint's failure to
15 state a claim against Dr. Bassewitz. Straznicky introduces his opposition by expressly
16 "tak[ing] liberty to expound on his allegations against Defendant Bassewitz." *Opposition to*
17 *Bassewitz Motion*, at 3. Straznicky then goes on to assert that Dr. Bassewitz "participated
18 in peer review activities and controlled, coerced or unduly influenced the decisionmaking
19 [sic] process." *Id.* Straznicky then recites a lengthy "Statement of Facts" that, while
20 repeating some of the allegations of the complaint, fails to cite to the complaint in support
21 of those allegations. Further, the opposition asserts numerous allegations not contained
22 within the complaint, and thus improper for consideration in deciding the motion to dismiss.
23 Moreover, although the opposition is in response to Dr. Bassewitz' motion to dismiss, none
24 of these new and additional allegations concern the conduct of Dr. Bassewitz.

25 Straznicky also concludes, in his opposition, that Dr. Bassewitz "is properly included
26 in the present case because of his role in the professional review activity as defined by

1 HCQIA. *Id.*, at 9. Once again, although this matter is before the court to test the
2 sufficiency of the allegations of his complaint, Straznicky fails to cite to any allegation of his
3 complaint to support this conclusion. As Straznicky has not even offered an argument
4 explaining how the allegations of his complaint state a claim against Dr. Bassewitz, the
5 complaint must be dismissed as to Dr. Bassewitz.

6
7 The Other Defendants' Motion to Dismiss

8 The remaining defendants--Desert Springs Hospital and Medical Center, the Board
9 of Trustees of Desert Springs Hospital, the Medical and Dental Staff of Desert Springs
10 Hospital, Michael Gross, M.D., Zafir Diamont, M.D., and Sam Kaufman--also move to
11 dismiss the complaint. Dr. Bassewitz has filed a joinder in the motion. Accordingly, for
12 clarity, the court will treat the motion as if filed by all defendants.

13 The first argument raised in the motion is that this court lacks jurisdiction because
14 Straznicky agreed, by signing the Privilege Retention Agreement, that exclusive jurisdiction
15 vested in the Eighth Judicial District Court of the State of Nevada to enforce the
16 Agreement. On initial consideration, the argument is somewhat confusing as the face of
17 the complaint does not indicate that Straznicky brought this suit to enforce the terms of the
18 Privilege Retention Agreement. Indeed, citing to his complaint generally, Straznicky argues
19 that he "has not raised a claim for breach of contract."

20 The court notes, however, that the defendants refer to Straznicky's motion for a
21 TRO in raising their argument. In support of that motion, Straznicky expressly argued that
22 he was entitled to an injunction because he was likely to succeed on the merits of his claim
23 for breach of contract. Further, his arguments in that motion make clear that the contract at
24 issue was the Privilege Retention Agreement he signed on March 3, 2009. As Straznicky
25 now concedes, however, his complaint lacks a claim for breach of contract. Accordingly,
26 as Straznicky concedes that he has not alleged a claim for breach of contract of the

1 Privilege Retention Agreement, this court has jurisdiction. Nevertheless, the court will duly
2 consider Straznicky's concession--that he has not alleged a claim for breach of contract--
3 when the court decides the motion for a preliminary injunction and must determine whether
4 he is likely to succeed on the merits of the "breach of contract" claim.

5 The second issue raised by defendants' motion is whether Straznicky's claims, to
6 the extent that they depend upon a determination that Desert Springs was not legally
7 required to file an adverse action report in the Data Bank, are premature because he has
8 not obtained a determination from the Secretary of Health and Human Services that Desert
9 Springs was not legally required to file an adverse action report. Pursuant to the Health
10 Care Quality Improvement Act, 42 U.S.C. §11101 *et seq.*, health care entities are legally
11 required to report "accept[ing] the surrender of clinical privileges of a physician (i) while the
12 physician is under an investigation by the entity relating to possible incompetence or
13 improper professional conduct, or (ii) in return for not conducting such an investigation or
14 proceeding. . . ." 42 U.S.C. §11133(a)(1)(B). The sanction against a health care entity that
15 fails to substantially comply with this requirement is significant: the health care entity loses
16 the statutory immunity created in §11111(a)(1) of the HCQIA. 42 U.S.C. §11133(c)(1).
17 The Act provides, however, that the Secretary establish procedures by which a health care
18 practitioner may dispute the accuracy of a submitted adverse action. 42 U.S.C. §11136(2).
19 The Secretary has promulgated this procedure by regulation at 45 C.F.R. 60.14. As an
20 adverse report includes a statement as to the basis for the action triggering the duty to
21 report, an adverse report is inaccurate if a basis does not exist requiring a health care
22 entity to file the report.

23 The National Practitioner Data Bank Guidebook (Data Bank Guidebook), published
24 by the Secretary, confirms that the Secretary's authority to review a report for accuracy
25 extends to and includes whether the health care entity was legally required to file the
26 report. As summarized in the Guidebook, "[t]he dispute process is not an avenue to . . .

1 appeal the underlying reasons of an adverse action affecting the subject's license, clinical
2 privileges, or professional society membership. Neither the merits of . . . the
3 appropriateness of, or basis for, an adverse action may be disputed." Data Bank
4 Guidebook at F-1. Rather, "[t]he Secretary reviews disputed reports only for accuracy of
5 factual information and to ensure that the information was required to be reported." *Id.*, at
6 F-3 (emphasis added). "If the Secretary concludes that the report was submitted in error,
7 the Secretary directs that the report be voided from the NPDB." *Id.*, at F-5. Notice is then
8 sent to all entities who have received notice of the disputed report to inform them that the
9 report was voided. *Id.*

10 Though Straznick's complaint is not an example of clarity, his subsequent
11 arguments to the court make clear that he intended some of his claims to be based, at
12 least in part, on his dispute whether Desert Springs was legally required to report that he
13 voluntarily surrendered his clinical privileges while under or to avoid an investigation
14 relating to professional competence or conduct. The Secretary has authority to review
15 whether a report was required to be filed, and has authority to remedy an incorrect filing by
16 voiding a report.

17 Straznick's argument that some types of disputes are outside of the Secretary's
18 scope of review is unavailing. Although the Secretary cannot review some types of
19 disputes, the Secretary can review whether an adverse report was required to be reported,
20 and has authority to order that a report be voided if it was not required to be filed. Equally
21 unavailing is Straznick's argument that procedures exist by which a report can be modified
22 subsequent to a judicial review of the underlying adverse action. The examples provided in
23 the Guidebook reveal that such provisions concern disputes that are outside the scope of
24 the Secretary's review. Straznick's reliance on the Data Bank Fact Sheet, and his
25 argument that it provides for procedures for attorneys to obtain reports for use in litigation,
26 is also misplaced. Read in context, those procedures make clear that they apply to

1 counsel representing a plaintiff in a malpractice claim against a hospital, and then only after
2 the attorney establishes that the hospital has not disclosed the report despite a discovery
3 request. That a plaintiff may bring a malpractice action against a hospital in federal court
4 does not require a determination that the Secretary is not the appropriate authority to
5 decide whether an adverse report was required to be filed.

6 By contrast, the First Circuit's deference to the Secretary in *Doe v. Leavitt*, 552 F.3d
7 ___, (First Cir. 2009) supports the conclusion that the Secretary has authority to resolve the
8 underlying question presented by Straznick: whether he resigned while under or to avoid
9 investigation. Thus, prior to bringing his claims (at least as far as they rely on his allegation
10 that the adverse report was not required to be filed), Straznick must exhaust his
11 administrative remedy by filing a dispute with the Secretary and obtaining a resolution of
12 that dispute. Straznick has not alleged, in his complaint,⁴ that he has filed a dispute with
13 the Secretary regarding the accuracy of the adverse report. Further, Straznick has not
14 alleged, in his complaint, that the Secretary resolved such a dispute. Accordingly, to the
15 extent that Straznick's claims require a determination by the Secretary that Straznick's
16 resignation did not trigger a legal duty requiring Desert Springs to file the adverse action
17 report, the claims are premature and must be dismissed.

18 The defendants argue that the complaint must be dismissed, with prejudice, to the
19 extent that, as the underlying professional review action met the standards of §11112(a),
20 they cannot be held liable for damages pursuant to §11111 of the HCQIA.⁵ Pursuant to
21 §11112(a), immunity from damages under the HCQIA relies upon a statutory presumption
22

23 ⁴ Straznick has represented to the court that he has filed a dispute, but that
24 the dispute has not yet been resolved by the Secretary.

25 ⁵ The defendants make clear, in their papers, that they seek immunity and
26 dismissal only as to Straznick's claims for damages other than his §1983 claim. As
conceded by the defendants, §11111 immunity does not extend to either equitable relief or
to a civil rights action.

1 that the underlying professional review action met the standards set out in §11112(a). The
2 burden rests upon the plaintiff to overcome that presumption by a preponderance of the
3 evidence. *Id.* Thus, in reviewing the issue, the court begins with the presumption that the
4 professional review action complied with §11112(a). However, as the question is before
5 the court on defendants' motion to dismiss, Straznicky may rebut the presumption by
6 showing that he alleged sufficient facts in his complaint. Accordingly, the court will
7 consider the defendants' argument in light of the allegations of the complaint and the
8 documents referenced by Straznicky in his complaint that he has presented to the court.

9 Straznicky's opposition does little to assist the court in finding that he has alleged
10 sufficient facts to overcome the presumption that the professional review action did not
11 comply with §11112(a). Rather, he relies upon a citation to the entirety of his general
12 allegations, and the allegations of Claims 1 and 5 through 9, and summarily asserts he
13 pled sufficient facts. Critically, though Straznicky argues he alleged that the defendants did
14 not provide him with due process, he does not address any of the four §11112(a)
15 requirements pursuant to which this court must review the propriety of a professional
16 review action. The court, however, will address each of the factors.

17 The record establishes that the Medical Executive Committee's (MEC) summary
18 suspension of Straznicky meets the first requirement that the MEC reasonably believed
19 that the professional review action was taken to further quality health care. The Notice of
20 Summary Suspension states that the suspension was "taken to reduce a substantial
21 likelihood of imminent impairment of the health or safety of any patient, prospective patient,
22 employee or other person present in the hospital. . . ." Section 11112(c)(2) implicitly
23 recognizes that a professional review body can reasonably believe that this type of action
24 furthers quality health care. By its own terms, §11112(c) expressly establishes that, for
25 purposes of §11111(a), nothing in the section is to be construed to preclude an immediate
26 suspension of privileges "where the failure to take such an action may result in an imminent

1 danger to the health of any individual.” As Congress has recognized that an immediate
2 suspension is appropriate in certain circumstances related to the quality of health care
3 (when the action may reduce imminent danger to someone’s health), a reviewing body can
4 form a reasonable belief that such an action furthers quality health care. In finding that the
5 first requirement is met, the court is not concluding that the MEC’s summary suspension of
6 Straznicky was warranted in this case. Rather, the court is concluding only that a reviewing
7 body can reasonably believe that summarily suspending a practitioner’s privileges to
8 reduce the likelihood of imminent impairment of the health of a person is an action in the
9 furtherance of quality health care.

10 The second requirement addresses whether a reasonable effort was made to obtain
11 the facts. The fourth requirement addresses whether the MEC could reasonably believe
12 that the facts warranted the imposition of a summary suspension. As the MEC imposed
13 the summary suspension based upon its receipt of a single report, whether the effort to
14 obtain facts was reasonable coincides with the determination whether the MEC reasonably
15 believed those facts warranted summary suspension.

16 While Straznicky generally argues a lack of due process, his opposition does not cite
17 to any allegation of his complaint suggesting that the MEC did not engage in a reasonable
18 effort to obtain the facts before deciding to summarily suspend him. In this case, the effort
19 to obtain facts before the summary suspension consisted solely of receiving a report of
20 Straznicky’s conduct. Thus, this effort was reasonable *if* the reported facts not only
21 warranted a summary suspension, but if those reported facts warranted such action without
22 any further effort to obtain facts.

23 Though not argued by Straznicky, the circumstances indicate that the MEC could
24 reasonably rely upon the single report. While the allegations of Straznicky’s complaint and
25 the report (at least, that portion cited in the Notice of Summary Suspension) differ in some
26 minor details, the two accounts are remarkably consistent. The consistency indicates the

1 MEC could reasonably rely upon the source of the report as reliable regarding the
2 materially significant events, and that reliance was reasonably placed on the report as a
3 substantially accurate description of those events.

4 The nature of the conduct reported to the MEC indicated that Straznicky's conduct
5 placed individuals in imminent harm. The court readily concludes that a patient is placed in
6 danger of imminent harm when someone causes the surgeon, who is performing a
7 procedure on a patient, to become visibly disturbed and distracted during the procedure.
8 The removal of protective equipment also constitutes conduct placing someone in
9 imminent harm.⁶

10 Straznicky argues, elsewhere in his opposition, that his conduct on February 2 "did
11 not create an on-going imminent harm to patients." The argument ignores that past
12 disruptive conduct can be indicative of an underlying characteristic that could manifest in
13 future disruptive conduct. When the nature of the disruptive conduct indicates both that an
14 imminent harm to a patient occurred and that the failure to take immediate action may
15 result in imminent danger to the health of individuals, a reviewing body can reasonably
16 believe that an immediate, summary suspension is warranted. The nature of Straznicky's
17 conduct was such that the MEC could reasonably believe that a summary suspension was
18 warranted.

19 The court would further note that it would reach the same conclusion if Straznicky
20 had reported his conduct, as he has alleged it in his complaint, to the MEC. The MEC
21 could reasonably believe that, in light of Straznicky's conduct as alleged by him, the
22 summary suspension was warranted as the failure to summarily suspend him could result
23 in an imminent harm to the health of any individual.

24
25 ⁶ During the hearing, Straznicky argued that he required the shield for his own
26 protection, and thus to avoid harm. The necessary corollary is that, by removing this
equipment from an operating room where it was needed for a procedure, Straznicky placed
someone in that adjacent operating room at harm.

1 The remaining, third requirement addresses whether the action was taken after
2 adequate notice and hearing procedures are afforded to the physician, or after such
3 procedures as are fair to the physician under the circumstances. Section 11112(c)
4 expressly recognizes that, when the circumstances warrant an immediate suspension,
5 subsequent notice and hearing or other adequate procedure are to be afforded to the
6 physician. As the court has found that the circumstances warranted a summary
7 suspension, the issue would typically depend upon whether the procedure for subsequent
8 notice and hearing was adequate. That process was initiated, but cut short, by Straznicky's
9 decision to resolve this matter by signing the Privilege Retention Agreement rather than
10 having a hearing.

11 The procedure that did occur was that Straznicky received a special Notice of
12 Summary Suspension, delivered by hand with a signed receipt required. The Notice
13 indicated the action being taken and the reasons for the action. The Notice informed
14 Straznicky that he could request an interview with the MEC for purposes of determining
15 whether the summary suspension should be terminated pending an evidentiary hearing,
16 provided that he simultaneously requested an evidentiary hearing. Straznicky made this
17 dual request on February 16, and was afforded the interview on February 18. On February
18 19, the MEC extended an offer to terminate the suspension, including a requirement that
19 Straznicky sign the Privilege Retention Agreement. He did so on March 3. Straznicky was
20 afforded and received an adequate post-suspension procedure.⁷

21
22
23 ⁷ The court's resolution addresses only that procedure actually provided and
24 required under the circumstances. As alleged by Straznicky, from February 19 through
25 March 3, he considered whether to sign the Privilege Retention Agreement. He was
26 specifically notified to obtain advice of counsel prior to making a decision. He made that
decision and signed the Privilege Retention Agreement on March 3. Thus, the adequacy of
post-suspension procedures effectively waived by Straznicky's decisions and actions is not
before the Court.

1 As Straznicky's complaint does not allege facts rebutting the presumption that his
2 summary suspension was not taken pursuant to the requirements of §11112(a), and as the
3 allegations of the complaint, as well as the documents relied upon by Straznicky in his
4 complaint, establish that he could not allege facts rebutting the presumption that these
5 standards were met, the court holds that the defendants are entitled to immunity from
6 damages pursuant to §11111(a) (other than for damages in a civil rights claim).
7 Accordingly, the court will grant the motion and dismiss Straznicky's complaint with
8 prejudice to the extent it seeks monetary damages on non-civil rights claims arising from
9 his summary suspension.

10 The defendants next argue that Straznicky's §1983 claim must be dismissed, with
11 prejudice, as they are not state actors and did not engage in a state action. Straznicky
12 counters that the defendants' summary suspension and other actions were state actions,
13 subjecting the defendants to §1983 liability, because Desert Springs *may* have received
14 Hill-Burton financial assistance, or other funds. To maintain his §1983 claim, Straznicky
15 must demonstrate both that he was deprived of a right secured by the Constitution or laws
16 of the United States, and that the defendants acted under color of state law. *Kirtley v.*
17 *Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003), *citing West v. Atkins*, 487 U.S. 42, 48, 108
18 S.Ct. 2250, 101 L.Ed.2d 40 (1988). Although a §1983 action cannot generally be brought
19 against a private party, "a § 1983 action can lie against a private party when 'he is a willful
20 participant in joint action with the State or its agents.'" *Id.*, *quoting Dennis v. Sparks*, 449
21 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

22 Straznicky fails to cite to any decision of the Ninth Circuit suggesting that a private
23 hospital's receipt of Hill-Burton funds renders the hospital a state actor (or causes its
24 actions to be state actions) for purposes of §1983. Straznicky's citation to *Duffield v.*
25 *Charleston Area Medical Ctr., Inc.*, 503 F.2d 512 (4th Cir.1974), for this proposition is not
26 well-taken by the court. The Fourth Circuit expressly overruled *Duffield* on this issue in

1 *Modaber v. Culpeper Memorial Hosp., Inc.*, 674 F.2d 1023, 1025 (4th Cir.1982) (overruling
 2 the holding that mere receipt of federal assistance under the Hill-Burton Act makes
 3 recipient's acts state actions).⁸ Rather, in 2002, the Fourth Circuit stated the following
 4 concerning a §1983 action brought against private hospitals:

5 The Maryland credentialing statute and regulation both require hospitals to
 6 establish a formal reappointment process. But the State plays no role
 7 whatsoever in the actual decision as to whether or not to terminate or
 8 reappoint any particular physician. Because the private hospital defendants
 cannot properly be considered state actors, [the plaintiff's] section 1983 claim
 is dismissed.

8 *Freilich v. Upper Chesapeake Health, Inc.* 313 F.3d 205, 214 n.3 (4th Cir. 2002).

9 Straznicky also relies upon *Klinge v. Lutheran Charities Ass'n of St. Louis*, 523 F.2d
 10 56 (8th Cir. 1975) for the same proposition: that a private hospital that receives Hill-Burton
 11 funds engages in state action when it removes a physician from staff. The issue, however,
 12 was never decided in *Klinge*. Rather, throughout the case, the court reiterated that no
 13 claim was made that the hospital's action was not state action. *Id.*, at 60-61. Consequently,
 14 the uncontested assumption of jurisdiction is entitled to little weight as a precedent that a
 15 private hospital's receipt of Hill-Burton funds renders its actions to be state actions.

16 As Straznicky has not alleged any facts, or cited to any decision, suggesting that the
 17 actions of a private hospital become state actions upon receipt of Hill-Burton financial
 18 assistance, the court will dismiss his §1983 claim with prejudice.

19 Therefore, for good cause shown,

20 THE COURT **ORDERS** that Dr. Hugh Bassewitz' Motion to Dismiss (#27) and the
 21 remaining Defendants' Motion to Dismiss (#18), joined by Dr. Bassewitz are GRANTED as
 22 follows:

23
 24
 25 ⁸ In light of *Modaber*, Straznicky's additional citation to *Harron v. United Hosp.*
 26 *Center, Inc.*, 384 F.Supp. 194 (D. W.Va 1974), *rev'd Harron v. United Hospital Center, Inc.*,
 522 F.2d 1133 (4th Cir. 1975) (holding that the plaintiff-physician's underlying anti-trust and
 civil rights claims were frivolous), in support of this same proposition is equally misplaced.

1 Dr. Martin Straznicky's claims (other than his claim for Declaratory and Injunctive
2 Relief, and his 42 U.S.C. §1983 claim) are DISMISSED with prejudice as to each
3 defendant to the extent each claim seeks to hold defendants liable for monetary damages
4 arising from the professional review action taken against Dr. Martin Straznicky;

5 FURTHER, Dr. Martin Straznicky's 42 U.S.C. §1983 claim is DISMISSED with
6 prejudice as to each defendant;


7 FURTHER, to the extent that Dr. Martin Straznicky's claims arise from the filing of
8 the National Physician's Data Bank Report, and have not been dismissed with prejudice,
9 such claims are dismissed without prejudice as to each defendant as premature;

10 FURTHER, to the extent Dr. Martin Straznicky's federal claims have not been
11 dismissed with prejudice, or have not been dismissed without prejudice as premature,
12 those claims are dismissed without prejudice as to each defendant;

13 FURTHER, to the extent Dr. Martin Straznicky's state claims have not been
14 dismissed with prejudice, those claims are dismissed without prejudice as to each
15 defendant as the court declines to exercise supplemental jurisdiction over those claims.

16 THE COURT FURTHER **ORDERS** that, as to any claim dismissed without prejudice,
17 other than a claim dismissed as premature, the plaintiff shall have no more than thirty days
18 from the date this Order is Entered and Served to amend his complaint.

19
20 DATED this 30 day of June, 2009.

21
22 
23 Lloyd D. George
24 United States District Judge
25
26